No. 19325

In the United States Court of Appeals for the Ninth Circuit

SAFEWAY STORES, INCORPORATED; CONTINENTAL BAKING COMPANY; LANGENDORF UNITED BAKERIES, INC.; HANSEN BAKING COMPANY, INC., RICHARD HOYT; BUCHAN BAKING CO., AND GEORGE B. BUCHAN, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

REPLY TO MEMORANDUM OF CONTINENTAL BAKING COMPANY RE APPLICABILITY OF FLOTILL PRODUCTS, INC. v. FEDERAL TRADE COMMISSION

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In a memorandum dated April 4, 1966, Continental Baking Company argues that the decision in *Flotill Products, Inc.* v. *Federal Trade Commission,* CCH 1966 Trade Cases, ¶ 71,720 (9th Cir. 1966), applies to this proceeding and requires, or may require, that it be remanded to the Commission. *Flotill* held that "an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC."

We submit that the argument of Continental is not well taken, and that the *Flotill* decision has no applicability to this case. The order here, directing petitioners to cease and desist from fixing bread prices, was issued by a 3 to 1 vote (R. II,

214-514—66

813, 866), not by a 2 to 1 vote as in *Flotill*. Hence it was "supported by three members," exactly as held to be required by *Flotill*.

After issuance, the effectiveness of this order was stayed pending proceedings on remand, and this was done because of the request of Continental (R. II, 873). The Commission, on May 28, 1964, directed that (R. II, 882):

> * * * the effective date of the Commission's decision and order of February 28, 1964, be, and it hereby is, stayed pending the proceedings on remand * * *

Continental had petitioned for an opportunity to rebut certain facts officially noticed by the Commission, about the internal management of Continental's interstate bread business, in deciding the so-called "commerce" question in this case (R. II, 830–836).

After the record had been reopened for this limited purpose (R. II, 877), and returned to the Commission, it was concluded by a 2 to 1 vote that Continental had not in most particulars shown the contrary of the facts officially noticed. It was then directed, on December 3, 1964, that (R. II, 985):

> * * * the order to cease and desist issued February 28, 1964, be, and it hereby is, made effective * * *

The 2 to 1 decision, after remand, in substance only amounted to a redetermination that, notwithstanding the contentions of Continental on remand, Continental's bread sales in Washington were in interstate commerce. No new cease and desist order was issued, the original order supported by a 3 out of 4 majority was merely put into effect.

Moreover, it is clear that the record in this case, entirely apart from the officially noticed facts and the proceedings on remand, was sufficient to establish that the price fixing activities of petitioners in Washington, including those of Continental, were in interstate commerce. Continental stipulated in the case-in-chief that in 1960 it sold $350,000,000 worth of bread and other bakery products in 60 cities and 29 states, that it was regularly engaged in interstate commerce in the sale and distribution of bread and other bakery products, that its coast-to-coast baking business was conducted on an *inte-*

grated basis, that purchasing was done at headquarters in New York, that all receipts went into a *single treasury,* that ultimate responsibility for company affairs was centralized in New York, that *each element of its bread and bakery business was part of an integrated whole,* that Continental was a single entity, that Continental in its whole business *benefited* by what was done by its individual bakeries and its local officials, such as those in Washington, and that New York headquarters of Continental approved membership in Bakers of Washington, Inc. (R. I, 304–305).

This Court in *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.,* 351 F. 2d 851, 860–861 (9th Cir. 1965), decided after the Commission's decision was issued and after its brief in this Court was prepared, recognized that where such facts existed, acts and practices within a state were in interstate commerce and subject to the jurisdiction of the antitrust laws. In *Rangen* this Court, applying the rationale of *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115 (1954), ruled (p. 861):

> Critical here is the fact that Rangen's payments to Grimes gave it a definite advantage in its own interstate dealings—the "beneficiary" was its interstate business—and therefore the payments must be regarded as having been made in the course of its own interstate commerce.

The price fixing activities of Continental in Washington, of course, gave it an advantage in its interstate bread business. The beneficiary was Continental's interstate business in which it was better able to compete because of the price fixing activities within Washington. This Court accordingly can sustain the cease and desist order issued by the 3 out of 4 majority of the Commission without relying upon the officially noticed facts, or upon the ruling after remand that Continental had failed to controvert such facts. Indeed, Continental appears to admit this (Memorandum, p. 3).

It is relevant to note that until now Continental never saw any error in the termination of the stay and the effectuation of the original order, after remand, by a 2 to 1 vote. It is now claimed for the first time, after all briefs have been filed, and

oral argument had, that this procedure was fatally defective. This alleged error patently is being raised at this late date because of the fortuitous occurrence, so far as Continental is concerned, of the *Flotill* decision. It is also relevant to note that Continental in its memorandum of April 4, 1966, in effect "wants to have its cake and eat it, too." Continental only advocates the application of *Flotill* to this case in the event that Continental loses on the merits. Continental wants this Court to undertake a decision on the merits. If it should appear, however, that the Commission's order is to be sustained, Continental then wants the entry of the decision to be shelved, *Flotill* ruled applicable, and the entire case remanded to the Commission.

We submit that such handling would be incorrect and unfair. The Court should first decide whether Continental can properly raise, at this time, the question of the effectuation of the original order, after remand, by a 2 to 1 vote. Only if this is determined to be proper should the question of the applicability of *Flotill* be taken up.[1]

For the foregoing reasons we believe *Flotill* has no application to this case, and a decision on the merits should be made.

Respectfully submitted,

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[1] The Commission has filed a petition for rehearing in the *Flotill* case, suggesting a rehearing *en banc*.

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